No. 11137

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY,

Appellant

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby,

Appellees

Reply Brief of Appellants

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division

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STATEMENT

Appellant presents this reply brief particularly for the purpose of pointing out wherein it is thought appellees have failed to properly interpret some of the fundamental points involved in this case and to answer the same and have failed to consider certain fundamental errors relied upon by the appellant. Apellant asserts that appellees misinterpret certain factual situations and the legal effect of certain evidence and the allegations of their complaint as amended at the time of the second trial. Furthermore, it is suggested that many of the authorities cited by appellees are not in point and others do not support the statements for which they are cited. Space does not permit an analysis of all of the cases but a few of them will be considered.

ARGUMENT

I.

APPELLEES' STATEMENT EXAMINED

Appellees commence their brief with what they call a "statement of facts." Issue is taken with their interpretation of the evidence upon which they seek to rely to support the judgment. It is to be observed that only a small portion of this statement is devoted to the fundamental theory of the case of supporting a judgment against appellant by reason of the conduct of Hair at the time of the Newby accident, and approximately three-fourths of this statement either deals entirely with, or alludes to, the so-called Myers incident. As pointed out in appellant's original brief (p. 36), more time is devoted to the Myers incident than to the accident for which appellant was sued.

On page 2 of their brief the appellees say:

> "Appellees submit that the record fairly shows evidence sufficient to go to the jury on the following facts: That Hair was drinking and undoubtedly proceeding as a drunken, reckless driver at the time of the unfortunate accident; that he had hauled guests to the knowledge of the company repeatedly; that he was in the course of company business, being in his own territory, calling on his dealers; advertising his products during business hours; making written report that he was on company business and generally conducting himself as he had been in the habit of conducting himself, while in the exclusive control of the car in the past."

We wish to examine this statement. It is to be observed that Hair was not charged with drinking or with drunkenness or

intoxication when this accident occured (R. 18-22). The idea of drunkenness was injected into the suit by an amendment of the complaint during the second trial, when the court permitted apellees to amend paragraph VII of the amended complaint by inserting the word "drunken" for the word "incompetent" (R. 316-317). It is to be definitely observed that paragraph VIII of the amended complaint (R. 21) charges that Hair, "with reckless disregard of the rights * * * of Avenell Newby," drove the car in such a manner as to cause the injury. There is no charge of drunkenness nor that Hair was drinking or was drunken at the time of the accident or that it was caused by intoxication. There is no substantial evidence that Hair "undoubtedly" proceeded as a drunken driver. We shall refer to this however a little later.

The statement that Hair "had hauled guests t othe knowledge of the company repeatedly" is definitely not supported by the evidence. The Myers incident is the only one where it could be maintained that the company knew that Hair hauled a guest, or had been drinking, and that incident should not, and can not, have any bearing in this case, because it is an isolated instance, happening three and one-half years prior to the Newby accident, and, further, because after that occurrence Hair and the agents of the company had a definite understanding, which is undisputed, to the effect that hauling of guests would never again occur (R. 295, 303, 304, 382). Hair having started out anew, that incident necessarily must be eliminated from the cause.

The statement that Hair was in the course of comparing business, "being in his own territory *calling on his dealers*,"

is misleading and certainly not supported by any evidence whatever. While the accident happened in the territory in which Hair usually worked, yet there is not a scintilla of evidence that Hair called on any dealer from the time he picked up Avenell Newby until after the accident. On pages 30 and 31 of appellees' brief certain testimony is quoted which, we presume, they mean to support their assertion that Hair was "calling on his dealers." There isn't a word in this testimony to the effect that he was calling on dealers during the time he was partying with Avenell Newby. Every question asked and every question answered had to do with his business under ordinary conditions and not under these conditions. If it be urged that these questions and answers created a presumption that he was carrying on business in the ordinary way, then this presumption was completely and wholly destroyed by Hair's definite testimony that during all of this period of time he did not do any business of any kind or character for the company, but was devoting his entire time to Avenell Newby (R. 398, 411-412). On page 33 appellees attempt to chide the appellant for not calling Dr. Hughart as a rebuttal witness touching the Myers incident. We, of course, were not trying the Myers case. While this suggestion by the appellees is improper (See Wright v. Safeway Store, Wash. 109 P. 2 542, Syllabus No. 4), yet appellees, having invoked it, we ask: "Why, if Hair was transacting any business during this time, did not appellees call some dealer to so testify?" The answer is plain. There was no such dealer.

It is asserted that Hair was advertising products "during business hours." There is no more evidence that he was adver-

tising products during business hours than that he was advertising products in the night-time and while his car was parked in front of the Enders Hotel where he and Avenell Newby were spending the early hours of the morning of the day of the accident. The only possible evidence that appellees urge that he was advertising products of the company during that time is the fact that appellant's sign was printed on the car. Such has been definitely held to be wholly insufficient to support the theory that he was thus engaged in his master's business when the evidence shows he was on a party of his own. See White v. Firestone Tire & Rubber Co., 90 F. 2d 637. The appellees cite no case to the contrary. Neither does the fact that products manufactured by the appellant were in the car prove or attempt to prove that Hair was on company business. See Allen v. Ross (Ark.), 138 S. W. 2d 409.

The fact that Hair made a written report to the company on the evening of the accident can not be considered evidence, in view of his testimony that such report was untrue and was made to his company for the purpose of deceit (R. 411-412). The statement that Hair was "generally conducting himself as he had been in the habit of conducting himself" when the accident occurred is likewise without proof. There is no evidence whatever that Hair conducted business of the company in the manner in which he acted from the time he picked up Avenell Newby until the time of the accident. On the contrary the evidence is, from the time of the so-called Myers incident until the Newby accident, his record was without blemish (R. 260-262, 414, 480-2). We most respectfully suggest therefore that the court consider the quoted paragraph

of appellee's "Statement of Facts" in light of the evidence presented. Every presumption has been definitely overcome and such cases as Willi v. Schaefer-Hitchcock, 53 Ida. 367, 25 P. 2d 167; Magee v. Hargrove Motor Co., 50 Ida. 442, 296 P. 774, Baldwin v. Singer Sewing Machine Co., 49 Ida. 231, 287 P. 944, and Joslyn v. Idaho Times Co., 56 Ida. 242, 53 P. 323, should certainly require a conclusion to this effect.

Appellees then continue with their "Statement of Facts" by stressing the Myers incident, which occurred three and one-half years before the Newby accident. This court in Reynolds Tobacco Co. v. Newby, 145 F. 2d 768, specifically ruled that the Myers incident could not be used nor relied upon, it being an isolated incident, for the purpose of proving Hair's incompetency as a driver of an automobile. No other incident was attempted to be proved. Appellees now seek by subtle artifice to connect up the Myers incident as competent proof on the theory that Hair's general reputation as a drunken reckless driver during the years 1939, 1940, and 1941, was proven, as they contend, by the witnesses Pugmire, Close, and Buskirk. Appellant has pointed out in its original brief the utter failure of this proof and the error of the court in receiving it and in refusing to strike it.

In further reliance on the Myers incident appellees urge that appellant's representatives suggested that Hair be continued in appellant's employ until the outcome of the manslaughter charge growing out of the Myers incident, although realizing that upon any such conviction involving drunken driving Hair's license would be revoked. Appellant asserts that such attempt on the part of appellees to urge the applica-

bility of such asserted proof might well be likened to pyramiding presumptions upon presumptions. They are presuming that the original Myers incident may now be accepted as proof and if so something else dependent thereon might likewise be considered. The Myers incident itself, having been excluded by this court as having any semblance of probitive value, then the later incidents relating to it would likewise have no probitive value nor any bearing whatsoever upon the issues.

Appellees assert, at page 29 of their brief, in support of their point No. 2 that "Hair was drunk," and driving as a drunken driver. Hair was never charged in the complaint with driving while intoxicated. While appellant asserts that the record does not show that Hair was intoxicated at the time of the accident, nevertheless, the theory is clearly applicable that, since the record shows Hair had partaken of intoxicants during the party of some eighteen hours which he and Mrs. Newby had together prior to the accident, and since the record likewise shows that Mrs. Newby partook of intoxicants too along with him, any evidence which may infer elements of intoxication or reckless disregard on the part of Hair at the time of the accident likewise is applicable to Mrs. Newby. Further, appellees' amendment to their complaint to include the allegations that Hair was a drunken driver brings the case within the rule of French v. Tebben, 53 Ida. 701; 27 P. 2d 475, of contributory negligence and assumption of risk. Mrs. Newby, by her own solicitation of the party, her subsequent acts and conduct with Hair, and her riding in the automobile as Hair's guest, clearly shows her assumption of all of the risks

thereof, and likewise these acts render her contributorily negligent, all under the rules of French v. Tebben.

On retrial appellees simply enlarged upon the Myers incident, spending more time on this matter than upon the case at bar, and notwithstanding the fact that the appellate court had ruled it insufficient to show incompetence of Hair. They seemed to think that it was the size of the incident rather than the incident itself and, without proof of any other act of misconduct, now try to support it with discredited statements of two police officers as to their opinion, when, if other incidents existed, the jury was in as good position as they to determine such fact. The case, therefore, can no more resist a reversal than it did before.

II.

DERIVATIVE LIABILITY OR SEPERATE VERDICTS

The appellant earnestly contends that in no event could its maximum liability exceed the amount of the judgment heretofore rendered against Rulon D. Hair. This mater is covered by appellant's assignments of error and the argument on pages 61-69 of its original brief. This is so because such damages, if any, which occurred to the appellees was the direct result of the conduct of Rulon D. Hair, and if there is any liability whatever on the part of the appellant it is a derivative liability. On page 25 of the appellees' brief it is said: "Counsel for appellees is not fully convinced or satisfied under the authorities that the case was not reversed as to Hair." The authorities cited by appellees in an effort to sustain such lack of conviction certainly do not support it. We invite them to

the Court's attention. The original judgment was against Hair, Donnelly, and this appellant. Donnelly and this appellant appealed. Hair did not appeal. The judgment was reversed as to appellants, and this was the theory upon which the court tried the case the second time (R. 112-113). The judgment, of course, became final as to Hair and its amount is the maximum liability that could possibly be asserted against an employer. If, however, there is no judgment against Hair, as suggested by appellees, then there can be no judgment in any amount against the employer. A failure of the trial court to recognize this principle of law demands a reversal of this case. On pages 22 and 24 of appellees' brief a number of authorities are cited in an effort to sustain the theory that in Idaho, where master and servant are defendants, separate verdicts may be returned in different amounts. The theory of derivative liability has been entirely overlooked and it is not argued in appellees' brief except to contend that the law of Idaho is contrary to this theory. This we believe is not so. We wish to analyze briefly the authorities on page 22 of appellees' brief which they urge sustains their theory.

The first case cited is Browder v. Cook & Quane, 59 F. Sup. 675. This is a decision rendered by Judge Clark in the District Court of Idaho. The question of derivative liability is not at all involved. As a matter of fact there is nothing in the case from which one could conclude that a master and servant relationship existed. It is upon the theory that joint tort feasors have been sued and verdicts in different amounts rendered. It is always to be remembered in the case at bar that the damage, if any, to the appellees was caused by Hair. There

was no independent act of any kind or character on the part of apellant upon which a verdict could be sustained against it. Appellees atempt to argue that appellant was negligent in employing Hair. This we contend is entirely unsupported by the evidence and the numerous errors recited in appellant's original brief, and the arguments based thereon support this theory. But if, for the sake of argument, and argument only, both theories involved in this case be considered, still the damage to the appellees, if any, was caused by Hair and not by any independent act of appellant, and appellant's liability, if any, is purely derivative.

The case of Judd v. O. S. L. Ry. Co. and Strickfaden v. Greencreek Highway Dist. have each been discussed in appellant's brief on pages 67-69. Again it is pointed out that the question of derivative liability was not considered in either of these cases. Furthermore, as appears in the Judd case, in 4 F. Sup. 675, liability of the railroad company was also urged for negligently failing to supply and maintain traffic signals and to clear approaches to its right-of-way, over which the engineer had absolutely no control, and with which he had nothing to do.

The next case is Wallace v. Hartford, 31 Ida. 481. Again, we submit this case is completely foreign to the point under consideration. It merely holds that the negligence of an agent to issue a policy of insurance rendered both the insurance company and the agent liable.

The case of Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441, is likewise unrelated to

the doctrine of derivative liability. This entire case is reflected in the syllabus in the following language:

> "A case in which plaintiff in good faith has elected to sue jointly in tort a foreign corporation and its servant whose misconduct caused the injury complained of, does not—even though such joinder may be improper — present a separable controversy between plaintiff and corporation which under the act * * * can be removed from a state to a Federal Circuit Court without regard to citizenship of individual defendants."

The next case is Gale v. Independent Taxi Owners Assn., 84 F. 2d 249. Here again the question of derivative liability is not discussed, but defendants were charged as having been engaged in a joint enterprise. There is then cited 8 Cyc. 804 and 23 Cyc. 1470. Probably no citations could be farther from the point involved than these two and it is difficult to understand why they appear. The first deals with constitutional law and presumptions as to the constitutionality of legislative enactments. The second citation deals with payment of joint judgments and the assignment of the judgment and the respective rights of the parties under such circumstances.

In the case of Hooks v. Vet, 192 F. 314, again the question of derivative liability is not discussed. Here there were a number of defendants sued for assault and battery and seemingly engaged in a joint tort. The case of Ohio Valley Bank v. Greenbaum et al, 11 F. 2d 87, is an action for deceit wherein the corporation and an individual were sued as joint tort feasors and for acts committed by each.

Appellees then cite two cases from Kentucky, one case from the State of Washington, and then again cite a Kentucky case. We wish to consider the Washington case first. It is Custis v. Puget Sound Bridge Co., 233 P. 936. Appellees contend that this case held that a complete exoneration of the servant would not effect the master, even though the facts showed the master was negligent. But it is to be noticed that this case is upon the theory that there was independent negligence on the part of the master. This is reflected in syllabus No. 2 as follows:

> "In joint action against master and servant for damages for tort committed by servant, where there is evidence of master's negligence *independent of any negligence of the servant*, verdict for servant does not release master." (Italics ours.)

On page 938 the court says:

> "The first of the reasons suggested (why the release of the servant should release the master) is that the release of Case by the jury is, in law, a release of the appellant and that therefore the motion for judgment notwithstanding the verdict should be granted. In Doremus v. Root, 23 Wash. 710, 63 P. 572, 54 L. R. A. 649, the rule was announced, which has been followed in some thirteen or fourteen cases since, that a judgment in favor of the servant in an action to recover damages for a tort committed by the servant is a bar to an action against the master to recover damages for the same tort of the servant, and where the servant and the master have been joined in actions of this nature a dismissal of the servant dismisses the master. With this rule of law there can be no quarrel and were the record undisputably such as would justify the court or a jury in saying that the acts which are relied on as a basis of the respondent's cause of action were

> acts committed by Case as a servant or employee of the appellant, the argument of the appellant would be conclusive."

The court then discusses independent tortuous acts of the employer, over which the servant had no control, and upon this basis makes its ruling. It is therefore to be observed that this case not only is not helpful to appellees but decidedly hurtful.

The Kentucky cases cited in appellees' brief and above referred to seemingly are contrary to the theory of derivative liability. But, consider them for a moment. The case of J. I. Case et al. v. Haines, 199 S. W. 786, was decided before the case of Myers' Admx. v. Brown, 61 S. W. 2d 1052. In the Myers case the question of derivative liability was before the court and the court in its opinion, on pages 1053 and 1054, quotes at length from Freeman on Judgments, sec. 469, part of which quotation appears in appellant's original brief on pages 62 and 63. After considering the text from Freeman, the Kentucky court recognizes its value and worth but concludes that it has in other cases, including the Haines case, held against the theory of derivative liability and should do so in this case. The matter, however, again came before the Kentucky court in a later case not cited by appellees. In the case of Illinois Central Railroad Co. v. Applegate's Admx. (Ky.), 105 S. W. 2d 153, while the court felt bound for other reasons to affirm a verdict against the railroad company when the agent had been exonerated, nevertheless, very clearly discourages and overrules this entire doctrine. Syllabus No. 17 is as follows:

> "Master's liability for tort committed by servant rests upon doctrine of respondeat superior and unless

> negligence on the part of the servant is shown a recovery against the master cannot be had."

On page 159 the court analyzes the Kentucky cases on this point and then says:

> "The rule was based on the theory that the master and servant were joint tort feasors. The theory, of course, was erroneous. The master's rights rest upon the doctrine of respondeat superior, and unless negligence on the part of the servant is shown, a recovery against the master cannot be had."

After attempting to justify some of its decisions on other grounds, the court continues:

> "In other jurisdictions where the question has been considered, it is held that a verdict against the master, after finding in favor of the servant in an action brought against the master and servant for damages caused solely by the negligence of the servant, is inconsistent and illogical and should not be permitted to stand."

The court then cites a large number of cases sustaining this statement.

The case just considered undoubtedly means that by overruling its previous decisions on this point the Kentucky court is now in accord with "other jurisdictions where the question has been considered," and the theory of derivative liability now presents, we believe, a uniform rule of law throughout the United States. Again we invite attention to the case of Pinnex v. Griffin, 221 N. C. 348, 20 S. E. 2d 336, which so clearly argues this point. We further suggest that to hold otherwise would impinge upon the constitutional rights of equal

protection of law. This is aptly suggested in All vs. Delaware & H. R. Corp., 29 N. Y. S. 2d 439, on page 441 as follows:

> "To permit a plaintiff to have damage in a greater amount against a master for the act of the servant than was allowed against the servant for the same act and for the same result would be an incongruity, if, indeed, it afforded the master, in respect to ad-measuring damages, the equal protection of the laws of the state within the intent of the constitution, Art. 1, Sec. 11."
>
> See Art. I, Sec. 13, Idaho Constitution.

III.

TESTIMONY AS TO REPUTATION

On pages 15, 16, and 17, of appellees' brief it is urged that it was within the discretion of the trial court to determine whether an expert or character witness has sufficiently qualified to permit evidence of opinion. A number of cases are cited which appellees seemingly contend support this theory. But appellant contends that under the facts in this case there existed no right to present such testimony and it was error to admit it. See original brief pages 41-45. Hence appellees' argument misses the point. Appellees also entirely disregard the further position of appellant. Here the qualifying testimony was entirely destroyed on cross-examination and said witnesses admited they had no information upon which to base their conclusions. Appellant then moved to strike this testimony. This motion should have been granted for the reasons argued in the original brief, pages 40-43. Appellees do not attempt to answer this argument and we submit it cannot be answered. To permit the testimony to remain was highly prejudicial.

IV.

TWO THEORIES IN THE COMPLAINT

Appellees argue on pages 38 and 39 of their brief that even though two theories were submited to the jury, yet if the verdict could be sustained on either theory they were entitled to recover. We take direct issue with appellees on this point. The submission of the case on both theories to the jury has been attacked by the appellant in numerous ways, particularly in the introduction of the evidence, motions to strike, objections to instructions to the jury, and refusal to give other instructions. If, as we contend, the court erred in these various particulars, obviously the verdict can not be supported, but furthermore it is the general rule that a general verdict must be reversed in a case where it could not be sustained on one of two or more grounds upon which the case was submitted.

In Southern Casualty Co. v. Hughes (Ariz.) 263 P. 584, the decision of the court is clearly stated in syllabus 14 as follows:

> "Where verdict for plaintiff could have been sustained on one of the two grounds on which it was submitted to jury but not on the second ground, general verdict for plaintiff must be reversed on appeal, since appellate court had no means of knowing on which ground verdict rested."

In Goldberg v. Globe & Republic Ins. Co. of America (Minn.) 259 N. W. 402, on page 403 it is said:

> "It is settled that where there are two or more material issues tried and submitted to the jury and the verdict is a general one, it cannot be upheld if there

> was error in instructing the jury as to any one of the two or more issues. * * * and we have no means of ascertaining, on which issue the jury returned the verdict."

In Christian v. Boston & M. R. R. (6 Cir.) 109 F. 2d 103, on page 105 the Court said:

> "Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues. Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed 708; New York N. H. & H. R. Co. v. Murphy, 2 Cir., 204 F. 420; Eric R. Co. v. Gallagher, 2 Cir., 255 F. 814."

In Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed 708, the opinion of the court is stated in the syllabus as follows:

> "Permitting the jury, over objection raised by a motion to strike, to take into consideration, in reaching the verdict, counts in a declaration which had not been supported by any evidence, is prejudicial error, where it is impossible for the record to say upon which counts of the declaration the verdict was based."

Rule 49 (b) of the Rules of Federal Procedure does not affect this theory. The submission of such interrogatories to a jury are permissive and not mandatory and does not change the general theory of law on this point. Marcus Loew Booking Agency v. Princess Pat, 141 F. 2d 152 (7 Cir.). If appellees wanted to have avoided this danger they should have invoked this rule. They are the litigants who presented the double theory.

V.

USE OF DEPOSITIONS

At the trial of the cause, over the objections of the appellant, the appellees were permitted to use certain depositions elicited on cross-examination of the witness Darr before the deposition had been placed in evidence. Appellees argue on pages 42 and 43 of their brief that they had a right to do this under Federal Rules 26 (d) and 43 (b). We submit that the entire point of appellant's objections is overlooked. The use of these depositions over the objection of the appellant was an effort to disprove anticipated defenses for example a waiver of appellant's instruction to Hair not to haul guests before this waiver had been asserted. This instruction was only one point in the case. It could not become material to the appellees until and unless the appellant asserted it. The rules referred to certainly do not authorize trying a case backward and neither do they authorize the use of depositions when, at least at that stage of the case, the same are wholly immaterial.

VI.

REQUESTED INSTRUCTIONS

On page 25 of appellees' brief complaint seems to be made that appellant specifies as error the giving of certain instructions on the theory alleged that Hair was a careless and reckless driver and appellees say they had no way of knowing from the statement of points relied upon what error would be specified. This argument is wholly without merit. The appellant took exceptions in open court to every instruction of which it now complains and stated in the presence of counsel

for appellees the grounds of such exception (R. 507-517). In the Statement of Points appellant asserts:

> "There should not have been given to the jury those certain instructions to which objection was made by appellant at the time said instructions were given, and there should have been given to the jury those requested instructions presented by appellant and refused by the trial court (R. 529)."

It cannot be argued that the foregoing did not fully acquaint appellees with appellant's intention with reference to this instruction. The record requested was all the rules required (R. 521-525 and particularly No. 29 on page 524).

Furthermore the objection to the particular instructions referred to was not to the wording but to the giving of any instruction on that particular subject matter.

VII.

NEW TRIAL

Appellant assigned as error the refusal of the trial court to grant its motion for a new trial and urges this error because of abuse of discretion on the part of the trial court for the reasons asserted in the opening brief, including excessive damages. Appellees in an attempt to answer this argument, on page 41 of their brief, assert that the case of Dept. of Water & Power v. Anderson, 95 F. 2d 577, relied upon by appellant is outmoded by the adoption of the Rules of Federal Procedure, and quotes one William D. Mitchell to the effect that there is now no appeal from an order denying a new trial. This is not a correct statement of the law. The federal courts

still have the power to consider and act upon the motion for a new trial where the trial court has abused its discretion in denying such a motion. The following cases have been decided since the adoption of the Federal Rules and, while a new trial was not granted in these cases, yet the language of the court in each instance clearly recognizes that the power still exists in the appellate court to consider this point. See King v. Leach, 131 F. 2d 8, decided Nov. 3, 1942, and Dyess v. W. W. Clyde & Co., 132 F. 2d 972, decided Dec. 16, 1942.

It is therefore respectfully submitted that this case should be reversed and appellant recover its costs.

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